THE PRIVILEGE AGAINST SELF-CRIMINATION; ITS HISTORY.[1]

THE history of the privilege against self-crimination has something more than the ordinary interest of a rule of evidence, — not only because the privilege has been given a constitutional sanction in nearly every one of our jurisdictions; nor merely because the tracing of its origin takes us back, in our survey, to the time of William the Conqueror; but particularly because the woof of its long story is woven across a complicated warp composed in part of the doctrines of the early canonists, of the continuous contest between the courts of the common law and the church, and of the political and religious issues of that convulsive period in English history, the days of the dictatorial Stuarts. To disentangle these various elements, while keeping each in sight and unbroken, is a complicated task.

To begin with, two distinct and parallel lines of development must be kept in mind, — the one an outgrowth of the other, succeeding it, and yet beginning just before the other comes to an end. The first is the history of the opposition to the *ex officio* oath of the ecclesiastical courts; the second is the history of the opposition to the criminating question in the common law courts, *i. e.* of the present privilege in its modern shape. Let us remember that there is, in the first part of this history, no question whatever of the subject of the second part, and that the second part has not yet begun to exist. The first part begins in the 1200's, and lasts well into the 1600's; the second part begins in the early 1600's, and runs on for another century.

1 The substance of the history here set forth was printed some ten years ago in these pages (5 HARV. L. REV. 71). Since that time, a wider survey of the sources and the collection of much additional material has made it possible to trace the the story more fully. This new material has served only to confirm the general results formerly outlined; but it enables the details of the development to be more accurately filled in. The opportunity has also been taken to correct certain important miscitations and misprints occurring in the original pages, due chiefly to the writer's absence from the country at the time of the printing, and his consequent inability to revise the proof and verify the citations.

It is hard to have to add, since the above was written, that this article has been bereft of an inestimable and hoped-for advantage. Our lamented master, Professor Thayer, corresponding on the subject a few weeks before his sudden passing away, had promised to examine the article in proof.

I. Under the Anglo-Saxon rule, the bishops had sat as judges and entertained suits in the popular courts. But William the Conqueror, before 1100, had put an end to this. His enactment required the bishops to decide their causes according to the ecclesiastical law; whence sprang up a separate system and a double judicature.[1] By a century later, the papal power and the regal power were in hot conflict over the delimitation of their jurisdictions; in the great Constitution of Clarendon, in 1164, Henry II. temporarily gained the advantage.[2] By another century, Stephen and John had lost ground; and under Henry III. the influence of the leaders of the church, foreign born and foreign educated, was in the ascendant.[3] When Henry married his French wife, in 1236, there came over four uncles with her, one of whom, by name Boniface, was placed in the see of Canterbury as archbishop (or perhaps archdeacon). In the same year, 1236 (Matthew Paris said 1237), there came over also a Cardinal Otho. These two men were active in developing the local church law of England.[4] First to be noted is a constitution of Otho, promulgated at a Pan-Anglican council in London, in 1236: "*Jusjurandum calumniæ in causis ecclesiasticis et civilibus de veritate dicenda in spiritualibus, quo ut veritas facilius aperiatur et causæ celerius terminentur, statuimus præstari de cetero in regno Angliæ secundum canonicas et legitimas sanctiones, obstante consuetudine in contrarium non obstante.*"[5] Next, in 1272, came a similar constitution from Boniface: "*Statuimus quod laici, ubi de subditorum peccatis et excessibus corrigendis per prælatos et judices ecclesiasticos inquiritur, ad præstandum de veritate dicenda juramentum per excommunicationis sententias, si opus fuerit, compellantur.*"[6] Meanwhile, the general struggle between papal and royal claims of jurisdiction had gone on. Under Edward I., the statute of *Circumspecte Agatis* (1285) favored the former's rights.[7] But by the early 1300's the statute *De Articulis Cleri*[8] set fairly

[1] Stubbs, Sel. Chart., 85, Const. Hist., ii. 171; Pollock & Maitland, Hist. Eng. Law, i. 66, 67, 432.

[2] Poll. & Mait., i. 104 ff., 430 ff.

[3] Stubbs, Const. Hist., ii. 57–65; Poll. & Mait., i. 100; Gneist, Const. Hist., i. 240.

[4] Poll. & Mait., i. 93, 94, 103; Gibson's Codex Jur. Eccl. Angl., 1011; Lindwood's Provinciale, preface to parts I. and II.; Jura Ecclesiastica, ii. 90; Coke, 12 Rep. 26; 2 Inst. 599, 657.

[5] Lindwood, pt. ii. p. 60; Gibson, 1011; 12 Rep. 28.

[6] Lindwood, pt. i. p. 109; 12 Rep. 26. In the notes to Lindwood, it is added that the laymen, "*suffulti potestate temporalium dominorum, in hujusmodi inquisitionibus citati noluerunt jurare de veritate dicenda.*"

[7] Statutes of the Realm (Cay), i. 101.

[8] Statutes, i. 209; 2 Inst. 600. The date given by the editors, Cay and Tomlins, is

definite limits; it was enacted that the royal officers should not permit "*quod aliqui laici in ballione sua in aliquibus locis conveniant ad aliquas recognitiones per sacramenta sua facienda, nisi in causis matrimonialibus et testamentariis.*" Such are the preliminary data at the opening of this first part of the history. What was their significance for the relation of the parties to the contest?

First of all, note that the opposition therein reflected had nothing to do with any objection to the general process of putting a man on his oath to declare his guilt or innocence; they concerned only the questions (*a*) *who* should have the right to do this, and (*b*) *how* it should be done. Moreover, the former of these things is alone at first concerned; later, the second comes to dominate in importance. Three stages are fairly well marked, namely, (1) to Elizabeth's time, (2) to Charles I.'s, (3) and afterwards.

1. *a. Who* should have the rights of jurisdiction? This was in the 1200's and 1300's the great question. The statute *De Articulis Cleri* settled the line of ecclesiastical jurisdiction over laymen by confining it to causes matrimonial and testamentary; and this in substance prevailed till the end of church courts in England.[1] The forms of writs of prohibition were thereafter based on this statute.[2] A century later, in 1402, under Henry IV., the papal or clerical power obtained some sort of enlargement of its "liberties and privileges;" [3] but under Henry VIII. this foreign and papal domination was repudiated, and in 1533[4] all canons "repugnant to the customs, laws, or statutes of this realm" were forbidden to be enforced. Under Mary, for a moment, in 1554,[5] the statute of Henry was repealed; but Elizabeth, in 1558,[6] took care promptly to restore it. Thenceforward the struggle of jurisdiction is against Elizabeth's own High Commission Court, and not against a foreign and papal power.

b. In the other important respect, namely, *how* the church courts should proceed, there is, as yet in the 1200's and 1300's, apparently

tempore incerto before the end of Edward II.'s reign (1326). Coke attributes it to the first few years of Edward I.; but this, for several reasons, is improbable. In 9 Edward II. (1316), certain *Articuli Cleri* had been presented by the clergy in a futile protest against the narrowness of their powers: Statutes, i. 171; Lindwood, pt. iii. p. 37; 2 Inst. 601, 618.

[1] With sundry detailed variations, noted in Poll. & Mait. i. 105 ff.

[2] Reg. Brev. 36 *b*; Fitzh. Nat. Brev. 41 A; Nichols' Britton, f. 35 *b*.

[3] St. 4 H. IV. c. 3.

[4] St. 25 H. VIII. c. 19; a statute "for the submission of the clergy to the king's majesty."

[5] St. 1 & 2 P. & M. c. 8.

[6] St. 1 Eliz. c. 1, §§ 6, 10.

no interference or hostile feeling at all, in relation to the methods that here concern us. It does not appear that the decrees of Otho and Boniface, above quoted, authorizing certain oaths to be employed, met with any more opposition than other acts done in assertion of the church's jurisdiction. The oath was plainly permitted, by the statute *De Articulis Cleri*, in causes matrimonial and testamentary; there was no objection to it as such. How could there be, in a community where the compurgation system was still in full force in the popular and the royal courts, and men might be forced to clear themselves by their oaths with oath-helpers, — where they even struggled for the privilege of it, for centuries afterward, against the innovation of jury trial? [1] The writs of prohibition, set forth by Britton and Fitzherbert,[2] mentioned an oath, to be sure; but, in the first place, this might equally be the compurgation oath (not the *jusjurandum calumniæ* or *de veritate*); and, in the next place, and chiefly, it was mentioned simply as a descriptive feature of the forbidden jurisdiction, — as if one should forbid writs of *habeas corpus* to be issued by a probate judge, not meaning in the least to strike at that sort of writ, but at the particular judge's power and jurisdiction. There is no reason whatever to believe that the statute *De Articulis Cleri* had among its motives any animus against the church's imposition of an oath as such.[3]

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1 Thayer, Preliminary Treatise, 25, 27.

2 Cited *supra*.

3 The only suggestion ever made to this effect has come from Coke, who claimed (12 Rep. 28) that in this respect Otho's constitution of 1236 was "against the law and custom of England," and that the statute 25 H. VIII. c. 14, cited *infra* (which he rewrites to suit his claim), merely restored the common law. His only authority is the concluding clause of Otho's above-quoted decree of 1236, "*obtenta consuetudine in contrarium non obstante.*" This clause, however, plainly applies, not to English custom, but to the church's own law; for not only was the use of any inquisitional oath a new thing at that time in the church's procedure (as explained *post*), but this particular form of oath was in the 1200's being much enlarged in its application. The form *jusjurandum calumniæ* (which, as explained *post*, included the oath *de veritate dicenda*) had been in 1125–30 not yet usable, in the church's practice, for clerical persons and in spiritual causes: Corp. Jur. Canon., Decretal. ii. 7, *de jur. calum.* cc. 1, 2; so, too, in 1145–53 "*inusitatum est*": ib. c. 4; by 1181 it was authorized for the clergy, "*consuetudine non obstante*": ib. c. 5; and finally, by 1294–1303, under Boniface VIII., it was prescribed in all spiritual causes: Sexti Decretal. ii. 4, *de jur. calum.* cc. 1, 2; compare also Lindwood, ii. 60. All this shows plainly enough what Otho meant in prescribing it for spiritual causes in England, in 1236, by his "*obtenta consuetudine in contrarium non obstante;*" and Coke's argument falls to the ground.

There is, to be sure, an apparently opposing passage (not cited by Coke) in the Constitution of Clarendon, c. 6, of 1164 (Stubbs, Sel. Chart., 238): "*Laici non debent accusari nisi per certos et legales accusatores et testes in præsentia episcopi, ita quod arch-*

Nevertheless (though the king's lawyers cared nothing about it) this procedure of Otho's and Boniface's, the *jusjurandum de veritate dicenda* (which we may call the inquisitional oath, as distinguished from the compurgation oath) [1] was then, for the church, an innovation. Hitherto, the trial by compurgation, or formal swearing of the party with oath-helpers, and the trial by ordeal, had been the common methods of ecclesiastical trial and decision. But in the early 1200's, under the organizing influence of Innocent III., one of the first great canonists in the papal chair (1198–1216), new ideas were rapidly germinating in church law.[2] The trial by ordeal was formally abolished by the church in 1215.[3] The trial by compurgation oaths "was already becoming little better than a farce." [4] There was a decided need of improvement in method. One of the marked expedients in this improvement was the inquisitional or interrogatory oath, introduced and developed in the early 1200's, chiefly by the decretals of Innocent III.[5]

diaconus non perdat jus suum." But this could not refer to Otho's new oath of 1236, for the simple reason that the latter did not come in, nor anything of the kind, until the next century (see the citations *post*). Moreover, this particular Clarendon clause (whatever it meant) seems not to have been opposed to the church's claims, for in a Vatican MS. of that constitution, it is said, while two other clauses are marked "*toler.*," and the rest "*damn.*," this clause 6 is ignored entirely: Gieseler, Eccles. Hist., Hull's ed. 1857, iii. 65; Smith's Hull's ed. 1857–8, ii. 289 (the contrary statement, in Poll. & Mait., i. 437, that "the pope seems to have condemned this constitution as a whole," is based upon authorities not here accessible for comparison). Probably the Clarendon clause was aimed at some sort of reform in the compurgation system, which was then degenerate (as noted *post*); moreover, who could be an "*accusator*" was then a much discussed question in church law: Decretal. ii. 7, *de accus.* Or it may have concerned the then changing judicial relation between the archdeacon and the episcopal ordinary: Schulte, Kathol. Kirchenrecht, § 59, iii.; Lea, Inquisition, i. 309.

Since printing, the remark has been observed in Poll. & Mait., i. 131, that the bearing of this clause is "very obscure."

[1] The word *inquirere* is the typical word in the passages of the Decretals issued under the new procedure.

[2] Schulte, Katholische Kirchenrecht, 1873, 3d ed., § 100, iii.; Poll. & Mait., i. 426; Lea, Inquisition, i. 309; Gieseler, Eccles. Hist., Hull's ed., iii. 157. This new movement was part of a general one, affecting also the substantive law of the church; on the procedure side, the rise of the papal inquisition of heresy, in the late 1200's, was another related phase.

[3] Thayer, Prelim. Treatise, 37; Lea, Superstition and Force, 4th ed. 419.

[4] Poll. & Mait., i. 426, 425.

[5] The first appearance of it, as administered to a party accused, seems to occur in Innocent's decretals of 1205 and 1206 (Decretal. v. 1, *de accusationibus*, cc. 17, 18), where, as the "*forma juramenti*," the persons charged "*meram et plenam dicant inquisitoribus veritatem;*" so also in 1208: ib. ii. 27, *de sententia*, c. 22 (an instructive case). As still a secondary resort, it appears, soon afterwards, under Honorius III., in 1216 (ib. ii. 24, *de jurejurando*, c. 32); and by the time of Gregory IX., in 1239, Innocent IV., in 1245, and Boniface VIII., 1294–1303, it comes to be the usual require-

The time-worn compurgation oath had operated as a formal appeal to a divine and magical test or *Gottesurtheil;* there was no interrogation by the tribunal; the process consisted merely in daring and succeeding to pronounce a formula of innocence, usually in company with oath-helpers.[1] But the new oath pledged the accused to answer truly,[2] and this was followed by a rational process of judicial probing by questions to the specific details of the affair, after the essentially modern manner. The former oath operated of itself as a decision, through the party's own act; the latter merely furnished material for the judge with which to reach a personal conviction and decision. This was an epochal difference of method. Indeed, the radical part played, for the progress of English procedure, by the new jury trial in the 1200's and 1300's, was paralleled, in a near degree, for ecclesiastical procedure, by the inquisitional oath in the 1200's. There were, to be sure, as time went on, several varieties of form to the oath. The chief forms were the simple *juramentum de veritate dicenda* (used in Boniface's English constitution of 1272, quoted *supra*), and the broader *jusjurandum calumniæ de veritate dicenda* (used in Otho's English constitution of 1236, quoted *supra*);[3] but their unity consisted in the subjection

ment and the typical mode of procedure (Sexti Decretal. i. 1, *de judiciis*, c. 1; ii. 4, *de jur. calum.* cc. 1, 2; ii. 10, *de testibus*, c. 2). As late as the Lateran Council of 1215, the old compurgation oath had still prevailed as the regular mode of trial for heresy: Decretal. v. 7, *de hæreticis*, c. 13 (= c. 3 of Concil. Lat.); but by the middle of that century the new oath became the customary instrument in the papal inquisition of heresy; which indeed owed its effectiveness largely to the new methods: Lea, Inquisition, i. 306, 313, 337, 411, 559.

[1] Brunner, Deutsche Rechtsgeschichte, i. 398, 427, 433, 435. For the church's compurgation oath, as distinct both in name and substance from the inquisitional or interrogatory oath, see good examples in Decretal. v. 34, *de purg. canon.* cc. 5, 13, 16; Decret. Pars II, causa V, qu. V, cc. 12, 15, 17, 19 (A. D. 1130–1148).

[2] "You swear that you shall make true answers to all things that shall be asked of you;" thus it was handed down in the 1600's. In the 1200's, its nature is well illustrated in a case of 1239, under Gregory IX.: Sexti Decretal. ii. 10, *de testibus*, c. 2: "*recepto juramento de veritate dicenda, iniungas dictis abbati et priori* [the opposing parties], *ut tam ponendo quam respondendo dicant veritatem quam super positionibus* [i. e., specific allegations of fact] *tibi sub bulla nostra transmissis ipsi sciunt et illos intelligunt in quorum animas juraverunt. Præterea, sigillatim super quolibet articulo in qualibet positione contento facias a partibus sufficienter adinvicem responderi.*"

[3] The difference between these two forms needs a little explanation. The *jusjurandum calumniæ* was primarily a general pledge that the cause was a just one; and originally it had been used independently in civil cases long before the old compurgation procedure had ceased to exist, — that is, as early as the 1100's: Decretal. ii. 7, *de jur. cal.*, c. 1. But, as time went on, it came to include a clause *de veritate dicenda*, or at any rate to be associated with that oath as a preliminary to every cause; this appears from 1245 onwards: Sexti Decretal. ii. 1, *de judiciis*, c. 1; ii. 9, *de confessis*, c. 2; ii. 4, *de jur. cal.* cc. 1, 2; Lindwood, ii. 60. Thus it became associated with and equally sig-

of the accused to a rational specific interrogation for the purpose of informing the judge.

Yet there *was* a distinction of real consequence (upon which everything came later to turn), regarding the different preliminary conditions upon which a party could be put to this or any other oath. There must be some sort of a presentment, to put any person to answer. But must that come from accusing witnesses or *per famam vicinæ* or the like (corresponding to our notion of a *qui tam* or a grand jury)? Or might it be begun by an official complaint (corresponding to our information by the attorney-general)? Or might the judge *ex officio mero* summon the accused and put him to answer, in hopes of extracting a confession which would suffice? And in the last method, must the charge at least be brought first to the judge's notice *per famam*, or *per clamosam insinuationem*, "violent suspicion"? Such were the questions of procedure which later formed the essential subject of dispute.[1] The last question became in the subsequent history the most important one; and it was apparently to be answered, in the strictness of the law, in the affirmative. Nevertheless, the matter was complicated by the varieties of detail in procedure, and there were differences of phrasing in the various decretals that served as authority. It is enough here to note that the third method of trial — the *inquisitio* or proceeding *ex officio mero* — became a favorite one for heresy trials; and that its canonical lawfulness in some shape was sup-

nificant of the new inquisitional oath procedure by the time of Boniface's English constitution, *supra*. The typical feature of that procedure, however, whether as a separate oath or as a clause in a larger oath, was the requirement *de veritate dicenda*, i. e., to answer specific interrogatories. For forms of this, see Lea, Inquisition, i. 399. For other forms of oath, see Burn, Eccles. Law, "Oaths," who is, however, not clear on the present subject. Gibson, Codex Jur. Eccl. Angl., 1011, has something, but not very helpful.

[1] This triple classification of the preliminary procedure, — *accusatio*, *denunciatio*, *inquisitio*, — which became the foundation of later discussions (Lea, Inquisition, i. 310, 401; Schulte, Kathol. Kirchenrecht, § 100), is said to have been founded on c. 8 of the canon of the Lateran Council of Innocent III., in 1215 (Hefele, Conciliengeschichte, 2d ed., v. 885); and so it doubtless was. But Innocent apparently composed that canon by adopting part of the language of two of his earliest decretals, of 1199 (Decretal. v. 3, *de simonia*, c. 31, to the Prior of St. Victor; ib. v. 1, *de accus.* c. 17, to the Bishop of Versailles), and the "*tribus modis*" of the former of these appear later as the classification in v. i. *de accus.* c. 24, identical with the Lateran Council's canon. — The phrase *ex officio*, destined to become so famous in England, in connection with the third mode, seems taken from the same c. 31, *de simonia*, of 1199: "*nos frequentibus clamoris excitati, ex officio nostro voluimus inquirere de præmissis;*" so again, also in 1199, ib. v. 32, *de purg. canon.* c. 10: "*licet contra eum nullus accusator legitimus appareret, ex officio tuo tamen, fama publica deferente, voluisti plenius inquirere veritatem.*"

ported by clear authority.[1] About the year 1600, there came to be much pamphleteering on this point; and a formal opinion of nine canonists declared the lawfulness of putting the accused to answer on these conditions: "*Licet nemo tenetur seipsum prodere* [i. e. accuse], *tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare.*"[2] Thus, on the one hand, it was easily arguable that, in ecclesiastical law, the accused could not be put to answer *ex officio mero* without some sort of witnesses or presentment or bad repute; and in this sense an oath *ex officio* (as it came to be called) might be claimed (as it was claimed) to be a distinct thing from the same oath when exacted on proper conditions, and to be therefore canonically unlawful. But, on the other hand, it is plain to see, also, how, in the headlong pursuit of heretics and schismatics under Elizabeth and James, the *ex officio* proceeding, lawful enough on Innocent III.'s conditions about *clamosa insinuatio* and *fama publica*, would degenerate into a merely unlawful process of poking about in the speculation of finding something chargeable. In short, the common abuse, in later days, of the *ex officio* proceeding led to the matter being argued, in English courts and in popular discussion, as if this oath were either wholly lawful or wholly unlawful; though, in truth, by the theory of the canon law, it *might* be either, according to the circumstances of presentment.

But (to take up again the story of Otho's and Boniface's decrees) all these distinctions, it must be clearly understood, did not trouble

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[1] As to the conditions precedent to an *ex officio* inquisition, lawfully putting a party to his oath, the foregoing extracts in note 1, p. 616, suggest something of the original orthodox practice; as also the following passages: ib. v. 1, *de accusationibus*, c. 21, A. D. 1212: "*inquisitio fieri debeat solummodo super illis de quibus clamores aliqui processerunt;*" ib. c. 24, A. D. 1215: "*debet inquisitionem clamosa insinuatio praevenire;*" see also ib. cc. 17, 19, 20, 23, 24; v. 34, *de purg. canon.* cc. 1, 5, 6, 10, 12, 15; *Sexti Decretal.* v. 1, *de accus. c.* 2; Lindwood, i. 109: "*a principio, ubi inquisitio sit generalis* [i. e. a roving commission, without specific accusation], *non debet exigi juramentum per quod aliquis peccatum alicujus occultum prodere cogatur; ex quo tamen crimina sine juramento corrigenda, poterit inquisitor super his exigere juramentum;*" i. 17: "*Inquisitio preparatoria fit sine exactione juramenti.*" — This much is worth noticing in detail, because it is this precise point of procedure in the canon law which led ultimately to so different a thing as our modern privilege against self-criminating testimony.

[2] Strype's Life of Whitgift, 339, App. 136 *et passim;* compare (1749) Conset's Practice of the Spiritual Courts, p. 384, pt. vii., cc. 1, 6; p. 100, pt. iii. c. 3, § 2. Compare this statement with Lindwood's, quoted *supra*, antedating it by several centuries. The uncertain phrasing of the later custom and law in the church is seen in Archbishop Whitgift's claim, in 1584 (Strype, 157, App. 63), when using the above formula, that if a man is "*proditus per denunciationem alterius, sive per famam,*" he is bound "*seipsum ostendere ad evitandum scandalum et seipsum purgandum.*"

the lay powers in their controversy of earlier days with the church on English soil. At the time of Edward's statute *De Articulis Cleri*, in the early 1300's, the royal power is not at all concerned, in this respect, with the method of ecclesiastical procedure, but only with the limits of that jurisdiction. Otho's and Boniface's constitutions of the 1200's were issued under a new and improved procedure in the church; if the king's lawyers had thought about it at all, they would probably have welcomed the better methods, for they certainly were dissatisfied with the church's old-fashioned compurgation methods.[1] But the jurisdictional controversy was the vital one, as the *Articuli Cleri* show in every paragraph. Wherever the king and his councillors concede this jurisdiction, there they are found ready enough to concede to the fullest the usual ecclesiastical procedure. In this very statute, indeed, *De Articulis Cleri*, they concede the church's oath-procedure where jurisdiction is conceded, i. e. in matrimonial and testamentary causes. As time goes on and the church becomes occupied with heresy trials, the same complaisance is equally plain. Towards the end of Richard II.'s time, during the Lollard agitation, the church began, in 1382,[2] to receive temporal sanction for its claims in the field of heresy, and finally, in 1401,[3] a statute gave to the church the punishment of heretics; these were to be arrested and detained by the diocesan when "defamed or evidently suspected," until they "do canonically purge him or themselves," the diocesan to "determine that same business according to the canonical decrees." Here is no objection to the oath or to the *ex officio* procedure, but a sanction of the church's usual rule. Under this statute Archbishop Arundel, with renewed vigor, conducted his campaigns against heretics;[4] and under it were all subsequent prosecutions conducted for more than a century.

After a long period, however, there finally appears the little rift within the lute. In 1533, the statute of Henry IV., of 1401, was repealed,[5] by a statute which did not take away the church's jurisdiction over heresy, nor yet oppose its power to put the accused

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[1] Poll. & Mait., i. 426, giving numerous examples. These learned and distinguished authors' incidental suggestion that "very possibly the lay courts would have prevented the prelates from introducing in criminal cases any newer or more rational form of trial" is opposed to what is above advanced; yet, for lack of their reference to a plain authority, is still open to respectful dissent.

[2] St. 5 Rich. II. 2d sess. c. 5.

[3] St. 2 H. IV. c. 15. In 1414, St. 2 H. V. c. 7, another statute provided for delivering indicted heretics to the ordinary, to be tried by the church's procedure.

[4] Stubbs, Const. Hist., ii. 488; iii. 32, 357–365; Lindwood, i. 298.

[5] St. 25 H. VIII. c. 14.

on inquisitional oath, but did insist on something more than *ex officio* proceedings; it provided that "every person *presented* or *indicted* of any heresy, or *duly accused by two lawful witnesses*, may be . . . committed to the ordinary [of the church] to answer in open court." Here was the first portent of the new phase of the contest. Under the brief liberality of Edward VI., in 1547, this whole jurisdiction over heresy was taken away;[1] but under Mary, in 1554, the extreme statute of Henry IV. was revived.[2] Then, Mary's statute was in turn repealed, in 1558, by Elizabeth,[3] who at the same time took into her own hands the church's powers, and, with the Court of High Commission, introduced new features into the controversy.

2. *a.* Under Elizabeth and James, and to the end of the story, there appears no further doubt (material to us now) as to the jurisdiction of the ordinary church courts; it was confined, in its control of laymen, to causes "matrimonial and testamentary;" and it was constantly prohibited from holding them to answer in other classes of cases. So also the Court of High Commission in Causes Ecclesiastical,[4] which Elizabeth, as head of the church, now constituted, in 1558, as an extraordinary instrument for carrying out her church policy, worked under similar limitations, though it constantly strove to exceed them, and though it perhaps had jurisdiction over heresy. So, too, that offshoot of the Privy Council, known as the Court of the Star Chamber (probably first organized in 1487, but not beginning until Elizabeth's time to exercise actively its great and for some time useful powers), had by its charter so broad a jurisdiction that little dispute could be made on that score.[5]

b. Thus, the emphasis of controversy now shifted. It had in the 1300's concerned jurisdiction; it now concerned methods. The objection portended in 1533, in the statute of 25 H. VIII. c. 14 (above quoted), was now to be the vital one. The Court of High Commission of course followed ecclesiastical rules; the Court of Star Chamber did likewise, in what concerned the procedure of trial.[6] No one is going yet to object to their general process

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[1] St. 1 Edw. VI. c. 12, § 3.

[2] St. 1–2 P. & M. c. 6.

[3] St. 1 Eliz. c. 1, § 15. Whether thus the statute of Henry VIII. was revived would be a question; Coke cites it as if in force: 12 Rep. 27; see the Case of the Bishops, 12 Rep. 7. It did not much matter, since Elizabeth's High Court claimed even ampler powers.

[4] St. 1 El. c. 1; Gneist, Const. Hist., ii. 170, 240; Coke, 4 Inst. 324, 12 Rep. 19.

[5] St. 3 H. VII. c. 1; Gneist, ii. 183, 245, 287; Coke, 4 Inst. 60; Stephen, Hist. Crim. Law, i. 173 ff.

[6] The Star Chamber Court, though its membership fluctuated, usually included the chancellor and the two chief justices; so that there was no lack of legal learning in it.

of putting the accused to answer upon oath; but there is to be much opposition to the preliminary methods, to the lack of a presentment, to charging a person *ex officio mero*. There was here some room (as we have seen) for uncertainty as to the proper canonical methods; and these courts were to strain all the possibilities, and even to exceed them.

The Court of Star Chamber seems to have raised no special antagonism during the 1500's, nor until James's time, in the next century. Nor did the Court of High Commission, under the first five commissions. But in 1583, the sixth was issued, with Archbishop Whitgift at the head, —a man of stern Christian zeal, determined to crush heresy wherever its head was raised. He proceeded immediately to examine clergymen and other suspected persons, upon oath, after the extremest *ex officio* style. From this time onwards there is much concerning this oath.[1] That it was canonically and statutably lawful was at least arguable.[2] The repealed statute of Henry VIII., c. 14, in 1533 (quoted above), which might otherwise have been urged against its methods, was now of doubtful validity.[3] Furthermore, the royal courts of common law, early in the agitation, had plainly declared these doings lawful on certain conditions. In 1589, the question had been first raised in the Common Pleas, in Collier *v.* Collier.[4] In 1591, in Dr. Hunt's

[1] Hallam, Const. Hist., i. 200 ff.; Neal, History of the Puritans, 1st ed., i. 274, 277, 281–286; Strype's Life of Whitgift, App. 49. Neal remarks that this was the first Commission to use the oath in *ex officio* manner.

[2] In 1583, certain ministers, under examination by Whitgift, had applied to Lord Burleigh to protect them; he mildly expostulated with the Archbishop, protesting that "this not a charitable way;" but the Archbishop firmly answered that "it is so cleare by law that it was never hitherto called in doubt;" and the matter ended (Neal, History of the Puritans, 1st ed., i. 281–286; Strype's Whitgift, 157, 160, App. 49, 63).

[3] Note 3, p. 619, *ante*.

[4] 4 Leon. 194; Cro. El. 201; Moor 906; charge of incontinency; according to one report, no decision was reached; by two others, the prohibition was granted. Coke was counsel for the petitioner, and cited the writs on the jurisdictional statute *de articulis cleri*, claiming that "*nemo tenetur seipsum prodere* in such cases," but only "in causes testamentary and matrimonial."

The king's judges were evidently new to the question, for in 1590, when the dissenting preacher Udall was being examined before (probably) the High Commission Court as to the authorship of the Martin Marprelate books, and refused to answer, saying, "to swear to accuse myself or others, I think you have no law for it," Anderson, J., of the King's Bench, bade Egerton, Solicitor-General (afterwards Lord Chancellor), tell Udall what the law was, and Egerton declared: "Your answers are like the seminary priests' answers, for they say there is no law to compel them to take an oath to accuse themselves;" and afterwards, when Udall again said he was not bound to answer Anderson, J., replied, "That is true, if it concerned the loss of your life," but "you ought to answer in this case" (1 How. St. Tr. 1271, 1274). This remark of

Case,[1] the King's Bench refused to sustain an indictment for administering the oath on a charge of incontinency, since "the oath cannot be ministred to the party but where the offence is presented first by two men, *quod fuit concessum;* and it was said, it was so in this case." So also, in the same year, when the case of the preacher Cartwright and his followers, for refusing to take Whitgift's oath and make answer, was brought up for a final settlement, all the chief judges and law officers gave it as their opinion that the refusal was unlawful.[2] Up to this time, then, it would seem that the stricter ecclesiastical rule was conceded by the highest authorities to be unimpeachable by common law courts. When James I. came to the throne, in 1603, the church's claim was, if anything, strengthened; for James, in his own conceit, was as good a canonist as theologian, and would be prone to favor so useful an engine against heretics as the proceeding *ex officio*. In the first scenes of his career, he appears plainly vouching for it.[3] So, too, when Bancroft succeeds Whitgift as Archbishop, bringing a like zealotry to the office, the common law judges seem to have been still complaisant.[4]

But in 1606 Sir Edward Coke comes to be Chief Justice of the

Anderson does not in terms fit any of the supposed rules; yet in the very next year, in Dr. Hunt's case, *infra*, he concurs in laying down the strict ecclesiastical rule; so that his views were as yet in formation.

[1] Cro. El. 262.

[2] Strype's Whitgift, 338, 360, App. 138; Neal, Puritans, 2d ed., i. 337 ff.; the officers were the two Chief Justices, the Chief Baron of the Exchequer, Sergeant Puckring, and the Attorney-General and Solicitor-General.

[3] Jan., 1604, Conference on Church Reformation, Neal's Puritans, 2d ed., i. 402; 2 How. St. Tr. 70, 86 (a Lord: "The proceedings in that court [of the High Commission] are like the Spanish Inquisition, wherein men are urged to subscribe more than law requireth, and by the oath *ex officio* forced to accuse themselves;" Whitgift, Archbishop of Canterbury: "Your lordship is deceived in the manner of proceeding, for if the article touch the party for life, liberty, or scandal he may refuse to answer;" Egerton, Lord Chancellor: "There is necessity and use of the oath *ex officio* in divers courts and causes;" His Majesty, James I., "here soundly described the oath *ex officio*, for the ground thereof, the wisdom of the law therein, the manner of proceeding thereby, and profitable effect of the same"). But the prelates were weakening; Whitgift, twenty years before, in his passage at arms with Burleigh (cited *supra*, note 2 p. 620), had never made the concession here recorded, or anything like it.

[4] 1605, Bancroft's Articuli Cleri, and the Judges' Answer, 2 How. St. Tr. 131, 155 (*Objection* [by the clergy, that the Judges issue a prohibition to the clergy on the ground] "that the party ought to have a copy of the articles being called in question *ex officio*, before he should answer them;" *Answer* [by the Judges]: "Yet ought they to have the cause made knowne unto them, for which they are called *ex officio*, before they are examined, to the end that it may appeare unto them, before their examination, whether the cause be of ecclesiasticall cognizance; otherwise they ought not to examine them upon oath").

Common Pleas, and a change begins gradually. Coke had been counsel for Collier in 1589,[1] and had perhaps thus acquired his convictions. It is well known that he set himself, as judge, against the ecclesiastical courts' pretensions in general. At first, however, he avoided a direct issue on the *ex officio* oath. His first case, in 1609, he decided on other points.[2] His next, in 1615, was allowed to drag on for a year or more, with repeated adjournments and other expedients intended to induce either the accused or the High Court of Commission to yield a point and avoid the direct issue.[3] The plain opinion of Coke, and, apparently, the final decision of the court, was that the oath was improperly put by the ecclesiastical court; yet the objectionable thing seemed to be, not that the accused should be compelled to answer, but that he should be charged *ex officio*, in a cause not testamentary or matrimonial but penal.[4] In the mean time (in 1610, 1611, and 1615), three other cases had come before the common law courts, presumably the King's Bench, and from their imperfect reports it may be inferred that a similar view was now prevailing there.[5] The change had thus substantially been effected.[6] Archbishop Abbot, a man

[1] *Ante*, note 4, p. 620.

[2] 1609, Edwards' Case, 13 Rep. 9 (Coke, C. J., and three others; prohibition granted against the High Court of Ecclesiastical Causes, in putting Edwards to his oath, on a charge of libel, as to his meaning in the words uttered; resolved on three grounds, first, the matter was temporal, not ecclesiastical; secondly, it was not for this special court; thirdly, "in cases where a man is to be examined upon his oath, he ought to be examined upon acts or words, and not of the intention or thought of his heart; and if any man should be examined upon his oath what opinion he holdeth concerning any point of religion, he is not bound to answer the same;" nothing was mentioned by party or judges, as to a privilege against matter involving a penalty, nor is the *ex officio* oath declared unlawful).

[3] Dighton *v.* Holt, 3 Bulstr. 48; briefly reported in Moor 840; 2 Cro. 388; 1 Rolle 337; Jura Eccles. 355, 9.

[4] In 12 Rep. 26, "Oath Ex Officio," is given by Coke an opinion, said by him to have been rendered by himself, as Chief Justice, as early as 1607, to the Commons, on their request; in this he plainly declares that in the ecclesiastical courts "no layman may be examined *ex officio*, except in two causes," matrimonial and testamentary. But the above date is doubtful; the volume was not printed until after his death, and its authority is not of the best.

[5] 1610, Mansfield's Case, Rolle's Abr. "Prohibition," (T) 4 (a clergyman was allowed to be examined on oath for preaching heresy); 1611, Clifford *v.* Huntly, ib. (T) 6, Jura Eccles. 427, 7 (a woman was not allowed to be examined as to a forfeiture); Huntley *v.* Cage, 2 Brownl. 14 (apparently the same case); 1615, Bradston's Case, Rolle's Abr. "Prohibition," (T) 1; Jura Eccles. 355, 9 (a layman was not bound to answer as to an offence involving forfeiture). All these, of course, are cases of prohibitions issuing to the ecclesiastical court.

[6] In Spendlow *v.* Smith, Hob. 84, Jura Eccles. 428, probably, late in 1615, a plain ruling was made; in a suit in the church court for dilapidation, charging a lease for

of less rabid views, had in 1610 succeeded Bancroft;[1] Coke had carried his views to the King's Bench, as Chief Justice, in 1613; and the matter seems to have been so far settled (in respect to the ecclesiastical claims) that no further case occurred,[2] until in 1640, the statute (quoted later) put an end, for the time, to further doubt.

But the Star Chamber claims remained still to be faced. What had been settled was (in effect) merely that the ecclesiastical courts (including that of High Commission) could not, as a matter of jurisdiction and procedure, put laymen to answer, *ex officio*, to penal charges. But this did not touch the Court of Star Chamber. Its conceded jurisdiction was ample enough to fine and imprison for almost any offence that it chose to pursue.[3] The very statute that organized it, in 1487, expressly vested in it the authority to examine the accused on oath in criminal cases, without naming even such restrictions as the ecclesiastical law conceded;[4] and its right to examine in this fashion, wherever the case was within its jurisdiction, seems to have been conceded under Henry VIII. and Elizabeth, all through the 1500's.[5] But as James's reign went on, and its practices became arrogant and obnoxious, so its use of the *ex officio* oath came to share the burden of criticism and discontent which that procedure in the ecclesiastical courts excited. The common-law courts seem to have found no handle against its oath-procedure, even after Coke's accession to the bench.[6] But though

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years and fraud, the defendant was put to his oath as to the fraud; this was held unlawful, "for though the original cause belong to their cognizance, yet the covin and fraud is criminal, and . . . punishable both in the Star Chamber and by the penal laws of fraudulent gifts, and not to be extorted out of himself by his oath."

[1] Neal, Puritans, i. 450.

[2] Except Jenner's Case, in 1621 (Jura Eccles. 427, 6; Rolle's Abr. "Prohibition," (T) 5; briefly reported, in accord with Edwards' Case, *supra*), and Latters *v.* Sussex, undated, but before 1616 (Noy 151).

[3] *Ante*, note 5, p. 619.

[4] St. 3 H. VII. c. 1.

[5] 1589, Rither's Case, Cro. El. 148, *semble;* 1591, Buckley *v.* Wood, Cro. El. 248.

[6] In the following two cases, Coke himself, at the very time when he was opposing from the bench (as already observed) the *ex officio* oath of the High Commission Court, appears as a consenting party to the enforcement of the even looser practice of the Court of Star Chamber:

1610, Andrew *v.* Ledsam, 2 Brownl. 49 (A. exhibited his bill in the Star Chamber against L., a broker, for defrauding him by forging deeds to represent the investments made by him with A.'s money; "L. had forged and counterfeited them, as he hath confessed upon his examination, upon interrogatories administered by the plaintiff in this court"; the only question was whether, among his punishments, he should lose one ear or both; "and these doubts were resolved by Coke, Chief Justice of the

there was no explicit judicial condemnation, there was, after a time, more than one formal questioning of it.[1] The analogy of the doctrine already settled by Coke in 1607–1616, for the ecclesiastical courts, was naturally invoked. Towards the end of its career, it would seem that some impression was being made on the court's own theory of orthodoxy.[2]

3. But its time in the kingdom was now drawing to an end; and the trial which seems to have precipitated the crisis came in 1637, — a case full of instruction for our present history. John Lilburn, an obstreperous and forward opponent of the Stuarts (popularly known as "Freeborn John"), constituted somewhere between a patriot and a demagogue, had the obstinacy to force the issue. A decade later, he came into a similar collision with the Parliament's government; but he makes his entrance as a victim of the King's Star Chamber: —

1637–1645, *Lilburn's Trial*, 3 How. St. Tr. 1315 ff.; John Lilburn was

Common Bench, — where they were moved, — and Fleming, Chief Justice of the King's Bench, that L. should lose but one ear");

1613, Countess of Shrewsbury's Case, 12 Co. 94, 2 How. St. Tr. 769 (before a council, including the Chancellor, the two Chief Justices, Coke being one, and the Chief Baron, probably the Star Chamber in substance; the Countess of Shrewsbury, being brought before the Council and "required to declare her knowledge" as to the escape of Lady Arabella Stuart, which the Countess was said to have abetted, declined to answer, first, because she had made a vow to God to keep the matter secret, and next, because she was privileged as a peer not to testify, except before her peers; both these claims were totally repudiated, and she was adjudged in high contempt; nothing was said, by either the party or the judges, of the procedure or the present privilege; yet it was certainly involved, if it had existed).

[1] 1629, Stroud's Trial, 3 How. St. Tr. 235, 237; Cobbett's Parl. Hist., ii. 504, 526 (certain members, including Hollis, Eliot, and others, having been arrested and examined by the king's order, and having refused "to answer out of parliament what was said and done in parliament" concerning treasonable utterances, the judges, being asked whether this refusal was not a high contempt, answered all "that it is an offence, punishable as aforesaid, so that this do not concern himself but another, nor draw him to danger of treason or contempt by his answer;" this was an equivocal utterance); 1644, Archbishop Laud's Trial, 4 id. 315, 385, 397 (being charged with unlawfully tendering the oath *ex officio*, some years before, he answers that "that was the usual proceeding in that court [i. e., Council of the Star Chamber];" it was "then the common, and for ought I yet know, then the legal course of that court").

[2] *Ante* 1635, Hudson, Treatise of the Court of Star Chamber, in Hargr., Collect. Jurid., i. 209 ("But the great question hath been, whether a witness which in examination will not give any answer shall be compelled to make answer to the interrogatories. . . . Therefore, if a witness conceive that the answering of a question may prejudice himself, it seemeth that he need not to answer; for he is produced to testify betwixt others, and not to prejudice himself"); 208 ("neither must it question the party to accuse him of a crime, for it is an high contempt to make the justice of this court an instrument of malice"). But Lilburn's case, *post*, shows plainly that the practice was very different from Hudson's exposition.

committed to prison by the Council of the Star Chamber, including the Chief Justice of the King's Bench, on a charge of printing or importing certain heretical and seditious books; on examination, while under arrest, by the Attorney-General, having denied these charges, he was further asked as to other like charges, but refused, saying: "I am not willing to answer you to any more of these questions, because I see you go about by this examination to ensnare me; for, seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination; and therefore, if you will not ask me about the thing laid to my charge, I shall answer no more; . . . and of any other matter that you have to accuse me of, I know it is warrantable by the law of God, and I think by the law of the land, that I may stand upon my just defence and not answer to your interrogatories." Afterwards, "some of the clerks began to reason with me, and told me every one took that oath, and would I be wiser than all other men? I told them, it made no matter to me what other men do." Then, when examined before the Chamber itself, he again refused, saying, "I had fully answered all things that belonged to me to answer unto," but as to things "concerning other men, to insnare me, and get further matter against me," he was not bound "to answer such things as do not belong unto me; and withal I perceived the oath to be an oath of inquiry," i. e. *ex officio*, "and of the same nature as the High Commission oath," which was against the law of the land, the Petition of Right, and the law of God as shown in Christ's and Paul's trials; yet, "if I had been proceeded against by a bill, I would have answered." Then the Council condemned him to be whipped and pilloried, for his "boldness in refusing to take a legal oath," without which many offences might go "undiscovered and unpunished;" and in April, 1638, 13 Car. I., the sentence was executed. On Nov. 3, 1640, he preferred a complaint to Parliament, and on May 4, 1641, the Commons (having not yet abolished the Star Chamber Court) voted that the sentence was "illegal and against the liberty of the subject," and ordered reparation. But, the petition going for a while no further, he applied once more, and on Feb. 13, 1645 (1646), the House of Lords heard his petition by counsel, Mr. Bradshaw urging for him the sentence's illegality, "the ground whereof being that Mr. Lilburn refused to take an oath to answer all such questions as should be demanded of him, it being contrary to the laws of God, nature, and the kingdom, for any man to be his own accuser;" and Mr. Cook arguing that, without an information, "to administer an oath was all one with the High Commission," whereon the Lords ordered that the said sentence "be totally vacated . . . as illegal, and most unjust, against the liberty of the subject and law of the land and Magna Charta;" and on Dec. 21, 1648, he was finally granted £3000 in reparation.

Lilburn's case, together with those of Prynne and Leighton (whose grievances were of another sort), were sufficiently notorious

to focus the attention of London and the whole country. The Long Parliament (after eleven years of no Parliament) met on Nov. 3, 1640. Lilburn was on the spot that day with his petition for redress. In March, 1641, a bill was introduced to abolish the Court of Star Chamber, as well as (then or shortly after) a bill to abolish the Court of High Commission for Ecclesiastical Causes.[1] These were both passed July 2–5 of the same year ; [2] and in the latter statute was inserted a clause which forever forbade, for any ecclesiastical court, the administration *ex officio* of any oath requiring answer as to matters penal.[3] This clause was in substance reënacted as soon as the Restoration of the Stuarts was effected.[4]

But was the oath hereby *totally* abolished in ecclesiastical courts, — that is, was it the *ex officio* proceeding only that was abolished, and could a man still be put to answer in a penal matter, in a cause lying within the court's jurisdiction and begun by proper canonical presentment? This question fairly remained open under the first statute, though less plausibly under the second one. During the next fifteen years after the enactment of the second statute, the matter came often before the courts, in applications for prohibitions. The various rulings are hardly to be reconciled.[5] But, by

[1] Cobbett, Parliamentary History, ii. 722, 762, 853.

[2] St. 16 Car. I. cc. 10, 11.

[3] 1641, St. 16 Car. I. c. 11, § 4 (no person "exercising spiritual or ecclesiastical power, authority, or jurisdiction," shall "*ex officio*, or at the instance or promotion of any other whatsoever, urge, enforce, tender, give, or minister" to any person "any corporal oath, whereby he or they shall or may be charged or obliged to make any presentment of any crime or offence, or to confess or to accuse himself or herself of any crime or offence, delinquency, or misdemeanor, or any neglect, matter, or thing, whereby or by reason whereof he or she shall or may be liable or exposed to any censure, pain, penalty, or punishment whatsoever").

[4] 1661, St. 13 Car. II. c. 12, § 4 (no person "having or exercising spiritual or ecclesiastical jurisdiction" shall tender to any person "the oath usually called the oath *ex officio* or any other oath," etc., in effect as in the prior statute).

[5] 1665, R. *v.* Lake, Hardr. 364, 388 (prohibition against exacting an oath on articles apparently involving a criminal charge ; apparently granted, but upon another point) ; 1665, Scurr *v.* Burrell, 1 Sid. 232 (prohibition against a charge of exacting the oath in *ex officio* proceedings for sitting in church with the hat on ; adjourned, and apparently not decided) ; 1669, Goulson *v.* Wainwright, 1 Sid. 374 (prohibition granted against exacting an oath on *ex officio* articles for "matters which are criminal") ; 1669, Taylor *v.* Archbishop of York, 2 Keb. 352 (prohibition lies against exacting the oath in criminal charges) ; 1671, Grove *v.* Elliot, 2 Ventr. 41 (prohibition against exacting oath on charge of keeping conventicles, etc. ; argued that "no man ought to be proceeded against without due presentment ;" held, that it did not appear to be a proceeding "merely *ex officio*," and due presentment must be presumed, and hence the prohibition was refused) ; 1680, Farmer *v.* Brown, 2 Lev. 247, T. Jones 122 ; s. c. Herne *v.* Brown, 1 Ventr. 339 (prohibition against requiring an answer to a charge of not paying a church tax ; apparently treated as a civil case, and not within the statute's pro-

the end of the 1600's, professional opinion apparently settled against the exaction of an answer under any form of procedure, in matters of criminality or forfeiture. Such, at any rate, beginning with the 1700's, was the application of the law ever after, without question.[1] The statutes had abolished, for those courts, all obligation to answer on oath to such matters, without regard to the form of presentment or accusation.

II. But what, in the mean time, of the common law? Thus far the controversy here examined has been purely one of ecclesiastical jurisdiction and ecclesiastical methods of presentment. The common law courts have concerned themselves with it simply by virtue of their superior authority to keep the church courts and other courts to their proper boundaries. In their enforcement of these restrictions, one thing seems plain: There is no feature of objection to the compulsion, in itself, of answering on oath; the objection is as to *who* shall require it, and *how* it shall be required. On the very eve of the statute of 16 Car. I., and of the disappearance of the Star Chamber forever, John Lilburn, the stoutest of recusants, is willing to answer all matters properly charged against him, and objects only to "such things as do not belong unto me." He seems to have known no broader defensive principle to fall back upon, more substantial or inclusive than a conceded rule of ecclesiastical procedure. Was there in fact, at the time, any available principle known in the common law courts in jury trials?

1. Down to the early 1600's, at any rate, it was certainly lacking. If we look at what the common law had to build upon, before then, there is nothing of the sort. The generations which forced an accused to the ordeal and the compurgation oath had plainly no scruple against such compulsion. Compurgation, under its later name of "wager of law," was enforced in the 1500's without objection. Jury trial came to be approved as a trial so much more

hibition; after a division of the court and adjournment, the prohibition was refused unanimously).

[1] 1750, L. C. Hardwicke, in Brownsword *v.* Edwards, 2 Ves. Sr. 243, 245 (refusing to compel discovery of an incestuous marriage punishable in the ecclesiastical court: "I am afraid, if the court should overrule such a plea, it would be setting up the oath *ex officio*, which then the Parliament in the time of Charles I. would in vain have taken away, if the party might come into this court for it"); and in 1752, Finch *v.* Finch, ib. 491, 493 ("as to the first objection to it, that it will subject him to ecclesiastical censures and that the court will not compel him to answer on oath, which is like an oath *ex officio*, that is true"); 1822, Schultes *v.* Hodgson, 1 Add. 105, (prosecution for adultery, etc.; "this is a criminal suit;" and none of the articles were required to be answered).

effective that the defendant's oath in wager of law became, indeed, rather a privilege than a burden.[1] In jury trial, to be sure, the oath was not administered to the defendant, because it would, in those days, still be regarded as a decisive thing,[2] and as a peremptory method of self-exoneration which would be entirely too easy; it was the jurors' oaths that were to "try" him, not his own; and so, in jury trial proper, either in civil or in criminal cases, the oath of the party does not appear. But wherever, in other proceedings, it was thought appropriate to have the defendant's oath, there was no hesitation in requiring it. All through the 1500's the statute-book records the sanction of oaths to accused persons. The Star Chamber statute of 1487 (3 H. VII. c. 1) had expressly sanctioned the examination of the accused on oath at the trial, because "little or nothing may be found by inquiry" of the ordinary sort. The statute of H. VIII., in 1533, authorized the common law officers to turn over indicted heretics for examination by the ordinaries upon oath.[3] Wherever a party is committed to jail by the judges for fraud or other misconduct done in the course of trial, by forging writs or the like, he appears to have been put to his examination on oath to disclose it.[4] Persons charged as bankrupts,[5] as Jesuits,[6] as abusers of warrants,[7] were to be examined on oath by common law officers. Most notably, every accused felon was required to be examined by the justices of the peace, and his examination to be preserved for the judges at the trial;[8] and,

[1] Thayer, Prelim. Treatise, 29.

[2] "All such persons to be tried by their oathes," is a phrase of 1543 in the Court of Requests: Seld. Soc. Publ. XII, lxxxv. See "Required Numbers of Witnesses," 15 HARV. L. REV. 83.

[3] *Ante*, p. 619.

[4] 1565, Whiteacres *v.* Thurland, Dyer 242 *a*; Dawbeny *v.* Davie, ib. 244 *a*; Thurland's Case, ib. 244 *b*.

[5] 1570, St. 13 Eliz. c. 7, § 5.

[6] 1593, St. 35 Eliz. c. 2, § 11 (any person suspected to be a Jesuit, etc., who "being examined by any person having lawful authority . . . shall refuse to answer directly and truly whether he be a Jesuit" shall be committed "until he shall make direct and true answer to the said questions").

[7] 1601, St. 43 Eliz. c. 6, § 1 (persons charged with abuse of warrants are to be sent for by the judges "and be examined thereof upon their oaths," and if the offence be confessed by them or otherwise proved, they are to be committed to jail).

[8] 1553, St. 1 & 2 P. & Mar. c. 13, § 4; 1555, St. 2 & 3 P. & Mar. c. 10 (inasmuch as the preceding statute did not extend to cases where the prisoner was not bailed, "in which case the examination of such prisoner, and of such as bring him, is as necessary, or rather more, than where such prisoner shall be let to bail," so it is extended to the latter case also); the defendant was here not put on oath, though the witnesses were, but the reason for this was merely as before, that the oath was thought to give to the accused's statements a solemnity and weight which would be too great an advantage.

so far as appears, not a murmur was ever heard against this process till the middle of the 1700's ;[1] and no statutory measure was taken to caution the accused that his answer was not compellable, until well on in the 1800's.[2] The every-day procedure in the trials of the 1500's and the 1600's, and almost the first step in the trial, was to read to the jury this compulsory examination of the accused ; in 1638, the year after Lilburn's imprisonment, in the very next recorded trial, the accused's previous examination before the Chief Justice was offered and read at the outset, without a shadow of objection.[3] Furthermore, as the trial goes on, the accused, in all this period of 1500–1620, is questioned freely and urged by the judges to answer ; he is not allowed to swear, for the reasons already noted, but he is pressed and bullied to answer.[4] A striking example is found in the jury trial of Udall, in 1590, for seditious libel ; and the significant circumstance is that Udall, who before the ecclesiastical High Commission Court, a few months previous,[5] had plainly based his refusal on the illegality of making a man accuse himself by inquisition, has here, before a common law jury with witnesses charging him, no such claim to make :—

1590, *Udall's Trial*, 1 How. St. Tr. 1271, 1275, 1289 : Udall pleaded not guilty ; and after argument made and witnesses testifying, Judge *Clarke :* "What say you ? Did you make the book, Udall, yes or no ? What say you to it, will you be sworn ? Will you take your oath that you made it not ? " declaring this to be a favor ; Udall refused, and the judge finally asks : "Will you but say upon your honesty that you made it not ? " Udall again refused ; Judge *Clarke :* "You of the jury consider this. This argueth that, if he were not guilty, he would clear himself ; " then, to Udall : "Do not stand in it ; but confess it ! "

The same features appear still in 1606, in the Jesuit Garnet's trial for the Gunpowder Plot ; called before the Council inquisitorially, he denies his liability to answer ;[6] but, tried on indictment

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[1] Greenleaf, Evidence, 16th ed., App. III. [2] Ib.

[3] 3 How. St. Tr. 1369, 1373.

[4] 1554, Throckmorton's Trial, 1 How. St. Tr. 862, 873 ; 1571, Duke of Norfolk's Trial, ib. 958, 972 ("then being ruled over by the Lord High Steward that he should answer directly to that question, he answered") ; 1588, Knightley's Trial, ib. 1263, 1267. Mr. Justice Stephen's summary of the proceedings at this period is in agreement with what is above said : Hist. Crim. Law, i. 325 ; so also, for 1565, Smith, Com. of England, ii. c. 26, quoted in Thayer, Prelim. Treatise, 157.

[5] *Ante*, p. 620, note 4.

[6] 1606, Garnet's Trial, 2 How. St. Tr. 218, 244 (Garnet : "When one is asked a question before a magistrate, he is not bound to answer before some witnesses be produced against him, '*quia nemo tenetur prodere seipsum*'") ; note that this is a reference to the ecclesiastical rule of presentment, as already examined, not a refusal to answer at all events.

before a common law jury and the chief common law judges, he is questioned and urged, he answers or refuses to answer, as it suits him, but says never a word of the illegality of such questions or an immunity from answer.[1] And such indeed, beyond a reasonable doubt, was the common law, as well as the common practice, of the time.

It is true that precedents apparently to the contrary have been alleged to exist, by Coke, for example, who invokes two common law cases to support his ambiguous and shifting arguments. But neither these, nor any others hinted at, indicate in any way the existence of any common law rule.[2] Even Coke himself, whose writings have since served as the chief source of information on this subject, actually does not go so far as to apply his arguments to any effect but the limitation of the ecclesiastical courts' proceedings.[3] He is willing to stop them from requiring answers "which may be an evidence against him at the common law upon

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[1] Ib. *passim*.

[2] Hinde's Case, 1558, Dyer 175 *b*; cited by Coke (12 Rep. 27; 3 Bulstr. 49) to show that a person need not answer in the church court questions that bring him in danger of a penal law. Hinde's case in fact was this: The king had appointed a commission to examine the title of Skrogs, a justice's clerk, to his office, with power to commit him if he refused to answer; he refused, demurring to the jurisdiction, and was committed; then he was released on *habeas corpus* by the judges of the Common Pleas, because "he was a person of the court, and a necessarie member of it;" and the reporter adds: "*Simile*, M. 18, by Hind, who would not take an oath before the ecclesiastical judges for usury."

Leigh's case, 1568, is cited by Coke (*ubi supra*) as that of an attorney committed by the High Court for refusing to swear as to attendance at mass, and delivered on *habeas corpus* by the Common Pleas, because "they ought not in such case to examine upon his oath." There is nothing to show that this was not an application of the ordinary ecclesiastical rule, examined *supra*. In Anon., 2 Brownl. 271 (1609), occurs a case similar to Skrogs'.

In Attorney-General *v.* Mico, cited *post*, other alleged precedents, unreported and scantily mentioned, were bandied back and forth by counsel; but there is nothing to show that they really involved the present question.

[3] In 4 Inst. 60, 324, on the Star Chamber and High Commission Courts, he says nothing of the oath. In 2 Inst. 657, and 12 Rep. 26, he has much against the oath, but substantially upon the ground of jurisdiction alone. In Dighton *v.* Holt (cited *ante*, p. 622), he advances frequently the argument *nemo tenetur* (he had first used it in Collier *v.* Collier, cited *ante*, p. 620); but this was an invocation of the canon law rule taken from the canon lawyers. In Edwards's Case (cited *ante*, p. 622), he is concerned chiefly with the jurisdiction, and does not even criticise the *ex officio* oath as such, though in his opinion in 12 Rep. 26, said by him to have been solemnly given two years before, he attacks the oath with great plainness. No two of his various expositions coincide in argument; to reconcile all of his passages is impossible. Add to this his inconsistent attitude in the cases of Andrew *v.* Ledsam and the Countess of Shrewsbury, cited *ante*, p. 623.

the penal statute;" but he says nothing about a common law illegality; indeed, this argument of his seems rather to assume the contrary. He freely quotes, in mutilated form, the canon law phrase (whose origin has been examined above) "*nemo tenetur seipsum prodere;*" but there is nothing to show, down to the end of his life, that he believed in or knew of any privilege of refusal in the king's common law proceedings.

The only source of doubt that can be found arises from certain scantily reported chancery rulings of the late 1500's. Some of these, at first sight, might be supposed to indicate the existence, as early as Elizabeth's reign, of a general privilege against self-crimination. Other explanations, however, lie open with fair plainness. In the first place, it is a long-established maxim of jurisdiction that equity will not lend its aid, even by relief, apart from discovery, to enforce a forfeiture; on this ground (and remembering that an "answer" in chancery is a pleading as well as testimony) are explainable the cases refusing to compel an answer as to a forfeiture.[1] In the next place, the chancellor had almost no jurisdiction over criminal charges;[2] hence, in cases of this nature, cognizance might be declined, by refusing to compel an answer.[3] But, where this jurisdiction was not disputable, there seems to have been no objection to compelling the answer.[4] Finally, the chancery practice is to be interpreted by the rule of the ecclesiastical courts, already examined. The chancellor was forming his procedure (hardly organized until Bacon's time, in the early

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[1] Such are the following cases: 1587, 1598, Cromer *v.* Penston, Cary 13 (bill against the survivor of a joint tenancy, suggesting a secret severance during lifetime; "the Lord Keeper overruled, that the defendant should not answer," — whatever this may mean); 1595, Wolgrave *v.* Coe, Toth. 18 (bill against one covenanting to deliver deeds; "the opinion of the court was, the defendant needed not to answer, because he should thereby disclose cause of forfeiture of the bond"); 1600, Toth. 7 ("Mildmay was not enforced by answer to the bill of Cary and Cottington, to discover a forfeiture to his own hurt"); see also Toth. 10.

[2] 1585, Wakeman *v.* Smith, Toth. 12 ("although criminal causes are not here to be tried directly for the punishing of them, yet incidently for so much as concerneth the equity of the cause, they are to be answered").

[3] This perhaps explains the following case, undated, but probably before 1600: Vice-Countess Montague's Case, Cary 12 (eloignment of a ward; upon a bill of discovery brought, "it seemed," as to the defendants, "they should not answer to charge themselves criminally, especially in this case, where so great a punishment as abjuration may follow").

[4] 1570, Anon., Dyer 288 *a* (examination on oath in chancery to answer a charge of perjury; held, by C. P., to be allowable if the Chancery Court had jurisdiction over perjury); 1631, Winn *v.* Swayne, Toth. 12 ("a commission to answer bribery and corruption").

1600's) almost precisely after that of the ecclesiastical courts.[1] So far as he could take cognizance at all of a case involving a criminal fact, he would of course employ this ecclesiastical rule, as he did others, and not require the defendant to answer without due accusation by two witnesses or by presentment; that is to say, a plaintiff, upon his unsworn bill alone, could not put the defendant to answer to a criminal fact. The close affinity between the chancellor's and the church's courts makes it plain that we need not look to the former for light upon the common law notions of the time — especially when that practice stands out plainly in the full and abundant reports throughout this whole period.

2. For nearly a generation onwards, in the 1600's, there is no acknowledgment of any privilege in common-law trials. Under Coke's leadership, from 1607 to 1616, the ecclesiastical courts had been kept within bounds; but there were as yet no bounds in common law proceedings. With 1620 begin indications that some impression was being transferred into that department.[2] Nevertheless, in the parliamentary remonstrances to Charles I., and the discussion over ship-money and forced loans and the Petition of Right, in the parliament which ended in 1629, there is nothing about such a privilege.[3]

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[1] "Equity followed the ecclesiastical courts almost literally in its mode of taking the testimony of witnesses and requiring each party to submit to an examination under oath by his adversary": Langdell, Equity Pleading, § 47.

[2] 1620, Sir G. Mompesson's Trial, 2 How. St. Tr. 1119, 1123 (the Lords' Committee reported "that they had examined many witnesses, . . . that the Lords' Committee urged none to accuse himself;" but their proceedings were probably inquisitorial, and came rather under the ecclesiastical rule); 1631, Fitzpatrick's Trial, 3 How. St. Tr. 419, 420 (Fitzpatrick had testified, at Lord Audley's trial, to a rape committed by F. at A.'s instigation; at F.'s own trial, he then protested against the use of his former testimony, since "neither the laws of the kingdom required nor was he bound to be the destruction of himself;" and Chief Justice Hyde replied, "it was true, the law did not oblige any man to be his own accuser," yet here the testimony could be used).

[3] The suggestion by Lilburn's counsel, in 1637 (3 How. St. Tr. 1356), that the *ex officio* oath was "directly contrary to the Petition of Right in 3 Car.," referred apparently to Par. iii. and x. of the Petition of Right of 1628 (3 How. St. Tr. 222; *infra*), which protested against being "called to make answer or take such oath." This, perhaps, referred to a political promissory oath of conformity or obedience in connection with the refusal to pay ship-money, — an entirely different thing. On the other hand, however, it may have referred to a really inquisitorial oath. The circumstances were these: Darnel, E. Hampden, and others, in 1627, on being required to make a loan to the king, and being examined to disclose their estates, declined to pay or to disclose, and applied for release under a *habeas corpus*, which was refused by the judges (3 How. St. Tr. 1); on which the Petition of Right was passed: 1628, 3 Car. I., c. 1, §§ 3, 10 (after reciting that persons refusing to make loans to the king "have had an oath administered unto them not warrantable by the laws or statutes of this realm," Parliament petitions "that none be called to make answer or take such oath," or be confined "for refusal thereof;" and the king accords the petition).

3. Finally, however, in 1637–41, comes Lilburn's notorious agitation ;[1] and in 1641, with a rush, the Courts of Star Chamber and of High Commission are abolished, and the *ex officio* oath to answer criminal charges is swept away with them.[2] With all this stir and emotion, a decided effect is produced, and is immediately communicated, naturally enough, to the common law courts. Up to the last moment, Lilburn had never claimed the right to refuse absolutely to answer a criminating question ; he had merely claimed a proper proceeding of presentment or accusation.[3] But now this once vital distinction comes to be ignored. It begins to be claimed, flatly, that no man is bound to incriminate himself, on any charge (no matter how properly instituted), or in any court (not merely in the ecclesiastical or Star Chamber tribunals).[4] Then this claim comes to be conceded by the judges, — first in criminal trials, and even on occasions of great partisan excitement ;[5] and afterwards, in the Protector's time, in civil cases, though not without ambiguity and hesitation.[6] By the end of Charles II.'s reign, under the Restoration, there is no longer any doubt, in any court ;[7] and by this period, the extension of the privilege to in-

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[1] *Ante*, p. 625. [2] *Ante*, p. 626. [3] *Ante*, p. 625.

[4] 1641, Twelve Bishops' Trial, 4 How. St. Tr. 63, 75 (on being asked whether they had subscribed the treasonable petition, they refused to answer, because they were not "bound to accuse themselves").

[5] 1649, King Charles's Trial, 4 How. St. Tr. 993, 1101 (one Holden objected to answering, and the court, "perceiving that the questions intended to be asked him tended to accuse himself, thought fit to waive his examination"); 1649, Lilburn's Trial, ib. 1269, 1280, 1292, 1342 (Lilburn, on a trial under the Commonwealth for treason, claimed that his former counsel, Bradshaw, now Lord President of the Council, had tried to make him criminate himself just as the Star Chamber Court had formerly done; he here refused on his trial to do so; Lord *Keble:* "You shall not be compelled;" *Lilburn:* "I am upon Christ's terms, when Pilate asked him whether he was the Son of God, and adjured him to tell him whether he was or no; he replied, '*Thou* sayest it.' So say I: *Thou*, Mr. Prideaux, sayest it, they are my books. But prove it;" Judge *Jermin:* "But Christ said afterwards, 'I *am* the Son of God.' Confess, Mr. Lilburn, and give glory to God;" see also p. 1445).

[6] 1655, The Protector *v.* Lord Lumley, Hardr. 22 (Exchequer; bill to discover defendant's estate, "for that he was outlawed whereby his goods and the profits of his lands were forfeited; the defendants demurrer, *quia nemo tenetur prodere seipsum*," is overruled, because "the outlawry is in the nature of a gift to the king or a judgment for him;" thus the general principle is apparently assumed valid; though, as already noted *ante*, p. 631, the equitable rule against aiding a forfeiture may have been the reason); 1658, Attorney-General *v.* Mico, Hardr. 139, 145 (Exchequer; bill for relief and discovery, for evading customs laws and attempting to bribe; demurrer, that the bill contained charges involving penalties and forfeitures; the defendant evidently cites most of his authorities from Coke's works, which had now been published; there was no decision; nor yet in case of Att'y-Gen'l *v.* ———, ib. 201, in 1662, probably the same case).

[7] 1660, Scroop's Trial, 5 How. St. Tr. 1034, 1039 (L. C. B. Bridgman: "You are

clude an ordinary witness, and not merely the party charged, is for the first time made.[1] It is interesting to note, in passing, that the privilege, thus established, comes into full recognition under the judges of the restored Stuarts, and not under the parliamentary reformers.

Nevertheless, the novelty and recentness of it all in common law proceedings is apparent, not only in the doubts which the Court of Exchequer, in 1658, so long entertained, and in the gradual progress of the recognition in criminal trials after 1641, but also in the fact that it remained an unknown doctrine for this whole generation in the colony of Massachusetts, — a colony not only familiar enough with common legal proceedings, but knowing enough to send over for Sir Edward Coke's reports and other law books to inform its court and keep abreast of the times; in this colony the privilege which began its career after the departure of its founders from England was unrecognized till at least as late as

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not bound to answer me, but if you will not, we must prove it"); 1662, Crook's Trial, 6 id. 201, 205 (the defendant, refusing to take the oath of allegiance, claimed that he ought not to accuse himself, for "*nemo debet seipsum prodere*"); 1670, Penn's and Mead's Trial, ib. 951, 957 (on a question being put to Mead, he refused to answer; "It is a maxim in your own law, '*Nemo tenetur accusare seipsum*,' which, if it be not true Latin, I am sure it is true English, 'that no man is bound to accuse himself'"); 1673, Penrice *v.* Parker, Finch 75 (bill for counsel's fees; demurrer allowed, that an answer would "draw him under a penal law"); 1676, Jenkes' Trial, 6 How. St. Tr. 1189, 1194 (defendant: "I desire to be excused all farther answer to such questions, since the law doth provide that no man be put to answer to his own prejudice;" and no further questions were put); 1679, Reading's Trial, 7 id. 259, 296 (Oates, for the prosecution, is not allowed to be asked questions to accuse himself); 1679, Whitebread's Trial, ib. 311, 361 (defendant's witness is not allowed to be asked whether he was a priest, because it would "make him accuse himself"); 1679, Langhorn's Trial, ib. 417, 435 (Oates is not allowed to be asked about "a criminal matter that may bring himself in danger"); 1680, Castlemaine's Trial, ib. 1097, 1096 (similar, for answers to "bring him in danger of his life"); 1680, Earl of Stafford's Trial, ib. 1293, 1314 (a question whereby a witness "shall accuse himself" is objected to); 1681, Plunket's Trial, 8 How. St. Tr. 447, 481 (a witness is not bound to answer questions that "may tend to accuse himself"); 1682, Bird *v.* Hardwicke, 1 Vern. 109 (bill of discovery, charging compounding a fraud; a plea is allowed, that the answer would "subject him to a forfeiture"); 1682, Anon., 1 Vern. 60 (defendant's argument that "A court of equity ought not to assist a man in recovering a penalty, nor compel a discovery of a forfeiture," is apparently conceded); 1684, Rosewell's Trial, 10 How. St. Tr. 147, 169 (witnesses are not bound "to charge themselves with any crime" or "subject themselves to any penalty"), 1685, Oates' Trial, ib. 1079, 1099, 1123 (witness is not compellable to make himself "obnoxious to some penalty"); 1691, African Co. *v.* Parish, 2 Vern. 244 (principle conceded); 1700, Firebrass's Case, 2 Salk. 550 (bill against a ranger for discovery of deer-killing; answer as to "what is to make him forfeit his place," is not compelled).

[1] Reading's Trial, *supra*, in 1679.

1685; more, they formally sanctioned the ecclesiastical rule by which the inquisitional oath was allowed.[1]

Moreover, the privilege as yet, until well on into the time of the English Revolution, remained not much more than a bare rule of law, which the judges would recognize on demand. The spirit of it was wanting in them. The old habit of questioning and urging the accused died hard, — did not disappear, indeed, until the 1700's had begun.[2]

The privilege, too, creeping in thus by indirection, appears by

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[1] 1642, Bradford's History of the Plymouth Plantation, 465 (answers by one of the ministers to a letter of inquiry from the Governor of Boston: "'Quest.: How farr a magistrate may extracte a confession from a delinquente to accuse himselfe of a capitall crime, seeing *Nemo tenetur prodere seipsum?*' 'Ans.: A majestrate cannot without sin neglecte diligente inquision into the cause brought before him. If it be manifeste that a capitall crime is committed, and that common report, or probabilitie, suspition or some complainte (or the like) be of this or that person, a magistrate ought to require and by all due means to procure from the person (so farr allready bewrayed) a naked confession of the fact . . . ; for though *nemo tenetur prodere seipsum*, yet by that which may be known to the magistrat by the forenamed means, he is bound thus to doe; or else he may betray his countrie and people to the heavie displeasure of God'").

This deliverance is corroborated by the following series of enactments, which exhibit the spirit of the times: —

1641, Massachusetts Body of Liberties, Whitmore's ed., § 45 ("No man shall be forced by torture to confess any crime against himselfe nor any other unlesse it be in some capitall case where he is first fullie convicted by cleare and suffitient evidence to be guilty. After which, if the cause be of that nature that it is very apparent there be other conspiratours or confederates with him, then he may be tortured, yet not with such tortures as be barbarous and inhumane"); § 61 ("No magestrate, juror, officer, or other man, shall be bound to informe present or reveale any private crim or offence, wherein there is no perill or danger to this plantation or any member thereof, when any necessarie tye of conscience binds him to secresie grounded upon the word of God, unlesse it be in case of testimony lawfully required"); 1660, Revised Laws and Liberties, "Punishment," "Jurors" (repeats in substance the foregoing); "Innkeepers" (parties may be examined by the magistrate, for offences against the liquor law); 1672, General Laws and Liberties, same titles (repeats in substance the foregoing; no changes were made as late as 1685).

No attempt has been made to discover the progress of the principle in the other colonies; but their records would doubtless disclose interesting material.

[2] The following are merely a few examples at random: 1656, Nayler's Trial, 5 How. St. Tr. 801, 806; 1660, Scroop's Trial, ib. 1034, 1039; Carew's Trial, ib. 1048, 1054; 1663, Twyn's Trial, 6 ib. 513, 532; 1679, Reading's Trial, 7 ib. 259, 302; 1702, Swendsen's Trial, 14 ib. 559, 580, 581; 1702, Baynton's Trial, ib. 598, 621–625. Sir J. Stephen (Hist. Crim. Law, i. 440) says that the practice of questioning the prisoner "died out soon after the Revolution of 1688"; but this is perhaps giving too early an end to it.

So, too, in the "Choice Cases in Chancery," 1652–1672, containing a short treatise on chancery practice, there is no mention of the privilege, among the rules for witnesses or for parties' answers.

no means to have been regarded as the constitutional landmark that our own later legislation has made it. In all the parliamentary remonstrances and petitions and declarations that preceded the expulsion of the Stuarts, it does not appear at all.[1] Even by 1688, when the courts had for a decade ceased to question it, and at the Revolution the fundamental victories of the past two generations' struggle were ratified by William in the Bill of Rights, this doctrine is totally lacking.[2] Whatever it was worth to the constitution-makers of 1789, it was not worth mentioning to the constitution-menders of 1688. It is a little singular that the later body, who had themselves suffered nothing in this respect, and could herein aim merely to copy the lessons which their forefathers of a century ago had handed down as taught by their own experience, should have incorporated a principle which those forefathers themselves, fresh from that experience, had never thought to register among the fundamentals of just procedure.

But, after all, the still more interesting question is, How did the result come about in England itself? How did a movement, which was directed, originally and throughout, against a method of pro cedure in ecclesiastical courts, produce in its ultimate effect a rule against a certain kind of testimony in common law courts? The process of thought, popular and professional, is to be accounted for. For our history of legal ideas we do not ordinarily expect to go to Bentham. But he was the first to search into this history, and to maintain that this common law privilege did not antedate the Restoration;[3] and, in this instance, his explanation of the process of thought by which the transmutation historically took place seems fairly to represent the probabilities. That explanation (as indeed the foregoing details exhibit) lies in the principle of the association of ideas, — an association which began to operate immediately in the reactionary period of the Restoration and the Revolution, when the growth and ascendancy of Whig principles involved all the Stuart practices in one indiscriminate and radical condemnation. Read in the light of the foregoing details, the great reformer's words serve as a correct analysis of motives and a fitting summary to the history:

1827, *Bentham, Rationale of Judicial Evidence*, b. ix., pt. iv., c. iii. (Bowring's ed., vol. vii., pp. 456, 460): "Of the Court of Star Chamber

[1] *Ante*, p. 632; Cobbett's Parl. Hist., ii. passim. In 1641, Parliament itself was trying its hand at inquisitional examinations; ib. 668, 672.

[2] 1688, 1 W. & M. 2d sess. c. 2.

[3] Mr. Justice Stephen (History of the Criminal Law, i. 342) expresses a view similar to Mr. Bentham's.

and the High Commission Court taken together, . . . the characteristic feature was that by taking upon them to execute the will of the king alone, as made known by proclamations, or not as yet known so much as by proclamations, they went to supersede the use of parliaments, substituting an absolute monarchy to a limited one. In the case of the High Commission Court, the mischief was aggravated by the use made of this arbitrary power in forcing men's consciences on the subject of religion. In the common law courts, these enormities could not be committed, because (except in a few extraordinary cases), convictions having never, in the practice of these courts, been made to take place without the intervention of a jury, and the bulk of the people being understood to be adverse to these innovations, the attempt to get the official judges to carry prosecutions of the description in question into effect, presented itself as hopeless. In a state of things like this, what could be more natural than that, by a people infants as yet in reason, giants in passion, every distinguishable feature of a system of procedure directed to such ends should be condemned in the lump, should be involved in one undistinguishing mass of odium and abhorrence; more especially any particular instrument or feature, from which the system was seen to operate with a particular degree of efficiency towards such abominable ends? . . . In those days, the supreme power of the state was *de facto* in the hands of the king alone; . . . being employed and directed against property, liberty, conscience, every blessing on which human nature sets a value, — every chance of safety depended upon the enfeeblement of it; every instrument on which the strength of that government in those days depended, every instrument which in happier times would to the people be a bond of safety, was an instrument of mischief, an object of terror and odium. . . . No practice could come in worse company than the practice of putting adverse questions to a party, to a defendant (and in a criminal, a capital case), did in that instance."

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